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No. 77-872

In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMITTEE OF LITERARY AND RESIDENTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-49a) is not yet officially reported. The opinion of the district court (Pet. App. 1a-32a) is reported at 426 F. Supp. 438.

JURISDICTION

The order of the court of appeals reversing the judgment of the district court was entered on September 21, 1977. The order of the court of appeals granting a permanent injunction was entered on November 1, 1977 (Pet. App. 50a-51a). The petition for certiorari was filed on December 13, 1977. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state may afford collective bargaining rights to interns, residents, and clinical fellows at certain health care institutions after the National Labor Relations Board has determined that they are "primarily students" rather than "employees" and thus should not be afforded such rights under the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 541, 88 Stat. 395, 29 U.S.C. (1970 ed. and Supp. V) 151 *et seq.*), are set forth at Pet. App. 52a–57a.

Other relevant provisions of the Act are:

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act

explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the correspond-

ing provision of this Act or has received a construction inconsistent therewith.

STATEMENT

In 1974, Congress amended[1] the National Labor Relations Act ("the Act") to extend the jurisdiction of the National Labor Relations Board to nonprofit hospitals and other health care institutions. Following the enactment of the amendments, a number of organizations, including petitioner herein, filed election petitions with the Board seeking to represent and bargain collectively for interns, residents, and clinical fellows ("housestaff officers") at certain nonprofit teaching hospitals. On March 23, 1976, the Board issued its lead decision on the question, *Cedars-Sinai Medical Center,* 223 NLRB 251, 253, in which it concluded that housestaff officers, although they "possess certain employee characteristics," are "primarily engaged in graduate educational training" and "their status is therefore that of students rather than of employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). Accordingly, the Board dismissed the petition.[2]

Petitioner then filed an election petition with the New York State Labor Relations Board

[1] Public Law 93–360, 93rd Cong., 2d Sess. (approved July 26, 1974), 88 Stat. 395.

[2] A number of other petitions were dismissed on the basis of *Cedars-Sinai.* See *St. Christopher's Hospital,* 223 NLRB 166; *University of Chicago Hospitals,* 223 NLRB 1032; *St. Clare's Hospital,* 223 NLRB 1002; *Buffalo General Hospital,* 224 NLRB 76; *Wayne State University,* 226 NLRB 1062. See also *St. Clare's Hospital & Health Center,* 229 NLRB No. 158 (decided May 26, 1977).

("NYSLRB"), the labor relations agency for the State of New York, seeking to represent and bargain collectively for housestaff officers at Misericordia Hospital Center. On July 14, 1976, the NYSLRB held that the hospital was subject to the jurisdiction of the NLRB, and that the NLRB's decision in *Cedars-Sinai* required dismissal of the petition. *Misericordia Hospital Medical Center,* 39 SLRB No. 32, decided July 14, 1976.

Petitioner then sued in state court to compel the NYSLRB to reinstate and process its petition. The state court ruled that the NYSLRB was free to take jurisdiction over housestaff officers. It read a more recent NLRB decision, *Kansas City General Hospital,* 225 NLRB 110, as expanding *Cedars-Sinai* and holding that states were not preempted from exercising jurisdiction over housestaff officers in nonprofit hospitals.[3]

Shortly thereafter, in response to the state court's decision, the Board, acting *sua sponte,* issued a revised decision in its *Kansas City* case, which had been relied on by the state court. In that revised decision (*Kansas City II*), the Board stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in *Cedars-Sinai;* that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find Federal

[3] *Committee of Interns and Residents* v. *New York State Labor Relations Board,* 388 N.Y.S. 2d 509, 512 (Sup. Ct. N.Y. Co.).

preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, * * * left the question as to whether [housestaff officers] were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in *Cedars-Sinai,* by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy.

Exercising the authority to protect its exclusive jurisdiction recognized in *National Labor Relations Board* v. *Nash-Finch Co.,* 404 U.S. 138, the Board then filed the instant suit in the District Court for the Southern District of New York. The Board sought an injunction barring petitioner from requesting the NYSLRB to assert jurisdiction over housestaff officers at health care institutions, and barring the NYSLRB from attempting to assert such jurisdiction.

The district court denied injunctive relief and granted petitioner's motion for summary judgment.[4]

[4] While the district court had the case under advisement, the state court reversed its earlier decision. *Committee of Interns and Residents* v. *New York State Labor Relations Board*, 391 N.Y.S. 2d 503 (Sup. Ct. N.Y. Co.).

The district court reasoned that, "[b]ecause of the NLRB's ruling that housestaff are not 'employees' under the NLRA, the labor relations of housestaff physicians are not subject to the provisions of the Act and are not within the jurisdiction of the Board" (Pet. App. 31a–32a).

The court of appeals reversed (Pet. App. 34a–49a). It held that the Board's conclusion that housestaff officers are not "employees" within the meaning of the Act was not a cession of jurisdiction over housestaff officers. Rather, the court of appeals stated, "the NLRB concluded [in its *Cedars-Sinai* and *Kansas City II* decisions] that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they 'are primarily students' " (Pet. App. 40a). The court of appeals, finding the situation here analogous to that in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, concluded that a state may not assert jurisdiction over individuals who the Board has decided, as a matter of national labor policy, should not be accorded collective bargaining rights (Pet. App. 41a–44a). The court of appeals enjoined the NYSLRB from asserting jurisdiction over the labor relations of interns, residents, and clinical fellows, and enjoined petitioner from attempting to invoke such jurisdiction (Pet. App. 50a–51a).

ARGUMENT

The decision of the court of appeals is correct and in accord with established principles, and there is

no conflict of decisions. Review by this Court is unwarranted.

1. Both the court of appeals and the district court recognized, and petitioner does not dispute, that "the unequivocal intent of Congress" in enacting the 1974 amendments was to grant the Board exclusive jurisdiction over the labor relations of health care institutions (Pet. App. 44a–46a, 19a–20a). This jurisdiction includes the power to decide whether policies of the National Labor Relations Act would be effectuated by extending collective bargaining rights to individuals associated with such institutions, and, if so, to classify them as "employees" under the Act. The Board concluded that housestaff officers are primarily students, rather than "employees" within the meaning of the Act, and petitioner does not attack that conclusion here. In so concluding, the Board has not put these students "beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy." *Kansas City II, supra,* 225 NLRB at 109. As the court of appeals added, "the NLRB has not ceded jurisdiction over housestaff [to the states]. Rather, the NLRB concluded that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they 'are primarily students'" (Pet. App. 40a).

The court of appeals therefore properly concluded that the situation here was analogous to that in *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* where the Board had refused to certify bargaining units of foremen. In *Bethlehem Steel,* the

Board never denied "its own jurisdiction over petitions because they were by foremen," but "made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes" (330 U.S. at 775). Similarly, here the Board never denied its jurisdiction over the housestaff petitions but refused to proceed to elections for them because of its determination that it would not effectuate national labor policy to extend collective bargaining rights to housestaff. Accordingly, here, no less than in *Bethlehem Steel:*

> The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control over their labor relations in general. It asserts, and rightfully so, * * * its power to decide whether [housestaff] may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted. [330 U.S. at 776.]

Here, as there, the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" (330 U.S. at 774).[5]

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[5] Petitioner contends (Pet. 27) that a "proper reading of *Bethlehem Steel* limits its preemptive effect to exclusions necessary and fundamental for the collective bargaining by those covered by the NLRA * * *." However, as shown *supra*, the rationale of that decision is not so limited.

Nor is petitioner aided by the fact that, because the Act excludes agricultural workers from the definition of "employee" in Section 2(3), the states may regulate the labor relations of such workers (see Pet. 26). As the court of appeals pointed out, "the underlying Congressional intent can lead to opposite results for

2. Petitioner argues (Pet. 23–24) that *Bethlehem Steel* does not apply here because the Board has created a "no-man's land" which, petitioner argues, can be created only by Congress. The short answer to petitioner is that the Board's decision does not create a "no-man's land." A "no-man's land" exists where "State authorities [are] without power to act in cases in which the Board [has], but [does] not exercise, jurisdiction under its established standards." 25th NLRB Annual Report 19 (1960), quoted at Pet. 31. Here the Board has exercised its jurisdiction by holding that housestaff officers are primarily students and that therefore it would be contrary to national labor policy to afford them collective bargaining rights.*

3. Petitioner's argument (Pet. 34–36) that the Board's action violates the Tenth Amendment and

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preemption purposes." The "exclusion of agricultural workers in § 2(3) * * * is the result of a Congressional decision not to exercise federal power over farm labor. * * * However, the exclusion of supervisors in the same Section is the result of a Congressional determination that national labor policy requires that supervisors not be guaranteed collective bargaining rights." (Pet. App. 44a n. 5.) As shown, the Board concluded that national labor policy requires a similar conclusion with respect to housestaff.

* Petitioner's fear that "house staff officers' labor relations and disputes, including strikes, [will] be left wholly unchecked and unregulated" (Pet. 20) as a result of the decision below is unfounded. Although the states may not act in contravention of national labor policy by treating housestaff as employees and granting them collective bargaining rights, this is not to say that the states would be powerless to regulate housestaff activities in a manner consistent with national policy. See *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Association, AFL–CIO*, 382 U.S. 181.

National League of Cities v. *Usery*, 426 U.S. 833, is baseless. *National League of Cities* addressed the problems raised "when Congress seeks to regulate directly the activities of States as public employers." 426 U.S. at 841. Nothing of the sort has happened here since the health care institutions involved are private employers. Congressional power to regulate labor-management relations is firmly established under the Commerce Clause, and inconsistent state efforts to regulate those relations must yield under the Supremacy Clause. *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra*, 330 U.S. at 773–774.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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